

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SJC-13386

CHRIS GRAHAM, JORGE LOPEZ, MEREDITH RYAN, KELLY AUER,
COMMITTEE FOR PUBLIC COUNSEL SERVICES, and HAMPDEN COUNTY
LAWYERS FOR JUSTICE,
Petitioners-Appellants,

v.

DISTRICT ATTORNEY OF HAMPDEN COUNTY,
Respondent-Appellee.

On Reservation And Report From
The Supreme Judicial Court For Suffolk County

BRIEF OF *AMICUS CURIAE*
THE NEW ENGLAND INNOCENCE PROJECT, THE INNOCENCE
PROJECT, INC., AND THE BOSTON COLLEGE INNOCENCE
PROGRAM, IN SUPPORT OF PETITIONERS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Mass. R.A.P. 17(c)(1) and Supreme Judicial Court Rule 1:21(a), *amici curiae* The New England Innocence Project, The Innocence Project, Inc., and The Boston College Innocence Program state that they do not issue any stock or have any parent corporation, and no publicly held corporation holds stock in the *amici*.

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STATEMENT OF INTEREST OF AMICUS CURIAE

The New England Innocence Project (“NEIP”) is a nonprofit organization dedicated to correcting and preventing wrongful convictions in the six New England states. In addition to providing pro bono legal representation to individuals with claims of innocence, NEIP advocates for judicial and policy reforms that will reduce the risk of wrongful convictions, including by ensuring that the presumption of innocence applies robustly and equally to all people and at all stages of the criminal legal system, from the moment of their encounter with the police through trial. That also includes ensuring that all evidence, regardless of its source or pedigree, is subjected to appropriately rigorous scrutiny and bears sufficient indicia of reliability before it is used against criminal defendants. In recognition of the grossly disproportionate number of members of communities of color who have been wrongfully convicted, NEIP’s mission includes ensuring that explicit or implicit racial bias does not operate in ways that serve to undermine the presumption of innocence.

The Innocence Project, Inc. (“IP”) is a 501(c)(3) national legal services and criminal justice reform organization based in New York that seeks to exonerate the wrongly convicted and prevent future miscarriages of justice. Founded in 1992 by Barry Scheck and Peter Neufeld, the Innocence Project’s attorneys pioneered the litigation model that has, to date, led to the exoneration of more than 350 wrongly

convicted persons in the United States through post-conviction DNA testing, and hundreds more through other forms of newly discovered evidence. To date, the Innocence Project’s attorneys have served as lead or co-counsel for more than 230 exonerated individuals in 32 states and the District of Columbia.

The Boston College Innocence Program (“BCIP”) is a clinical legal educational program at Boston College Law School where students and faculty study the problem of wrongful convictions and work to remedy and prevent these injustices. In addition to its educational mission and in-house clinic providing pro bono representation to indigent Massachusetts prisoners maintaining their factual innocence, BCIP brings legal and interdisciplinary research to bear on law and policy reform initiatives to identify, correct, and prevent wrongful convictions.¹

¹ Pursuant to Mass. R.A.P. 17(c)(5), *amici* declare that no party or counsel for a party authored this brief in whole or in part, that no person other than *amici*, its members, or their counsel has made any monetary contribution intended to fund the preparation or submission of this brief, nor has *amici* or its counsel represented one of the parties to the present appeal in another proceeding involving similar issues.

ISSUES PRESENTED

On February 1, 2023, this Court solicited amicus briefs addressing the following issues:

- (i) Whether the July 2020 report by the Department of Justice, together with other evidence of misconduct by the Springfield Police Department, triggered the Commonwealth's duty to investigate and, if so, what that duty entails.
- (ii) When a police department has been alleged by an investigating agency to have engaged in a pattern or practice of misconduct, what evidentiary disclosures a State prosecutor must make in order to satisfy the duty to “learn of and disclose to a defendant any exculpatory evidence that is ‘held by agents of the prosecution team’” in matters involving that police department. See Matter of a Grand Jury Investigation, 485 Mass. 641 (2020); Commonwealth v. Cotto, 471 Mass. 97, 112 (2015).
- (iii) What obligations the prosecution has when a police department declines to turn over exculpatory evidence concerning police officers who are members of prosecution teams.
- (iv) Whether each of the petitioners has standing to bring this case and invoke the court's superintendence power.

This amicus brief will address issues (i)-(iii) per this Court’s amicus solicitation. The New England Innocence Project (“NEIP”), Innocence Project, Inc., (“IP”), and Boston College Innocence Program (“BCIP”) urge this Court to exercise its authority under Massachusetts General Law Chapter 211, Section 3, to grant the relief sought in Graham et al., v. District Attorney for Hampden County, No. SJC-13386 (April 18, 2023) (“Graham Brief”).

PRELIMINARY STATEMENT

The Springfield Police Department’s (“SPD”) pattern or practice of Constitutional violations and misconduct, as found by the Department of Justice (“DOJ”), along with the Hampden County District Attorney’s Office’s (“HCDAO”) failure to investigate the scope of this misconduct and disclose exculpatory evidence, warrants the urgent attention of this Court. The Narcotics Bureau of the SPD was the focus of a DOJ investigation that resulted in the Trump Administration’s sole pattern-or-practice finding against any police department in the country.² Its July 2020 report concluded that the SPD engaged in “a pattern or practice of excessive force . . . without accountability.”³ This pattern or practice of excessive force was “directly attributable to systemic deficiencies in policies, accountability systems, and training.”⁴ SPD officers “submit[ted] vague and misleading reports documenting their uses of force” and “falsified reports to

² DOJ launches consent decree with Springfield, Mass., police, The Washington Post, (April 13, 2022), <https://www.washingtonpost.com/national-security/2022/04/13/springfield-police-consent-doj/>.

³ Investigation of the Springfield, Massachusetts Police Department’s Narcotics Bureau, Department of Justice, at 2, (July 8, 2020), <https://www.justice.gov/opa/press-release/file/1292901/download> (cited hereinafter as “DOJ Report”).

⁴ Id.

disguise or hide their use of force.”⁵ Although all incidents of force are to be referred to the SPD’s Internal Investigations Unit (“IIU”), Command Staff did not make *any* referrals to the IIU between 2013-2018.⁶ This failure, alongside deficient investigations into complaints made by the public, resulted in “zero sustained findings of excessive force” against any SPD officer.⁷

This level of systemic misconduct contributes to wrongful convictions and violates fundamental due process rights. This Court’s exercise of its superintendence authority is necessary to prevent and correct wrongful convictions resulting from official misconduct and to protect Black people and people of color who are disproportionately victimized by official misconduct. This Court should take this opportunity to clarify the investigation and disclosure obligations of prosecutors when they are on notice of potential police misconduct, especially a *pattern or practice* of police misconduct.

SUMMARY OF THE ARGUMENT

Prosecutors must investigate and disclose exculpatory evidence, including existing and potential misconduct within a police department, to people accused of crimes. [Infra at 18-23]. Failing to provide such evidence is a leading cause of

⁵ Id.

⁶ Id.

⁷ Id.

wrongful convictions and disproportionately harms Black people and people of color. [Infra at 23-28]. Because prosecutors and police officers work closely together and rely on each other, cognitive bias can operate to prevent prosecutors from clearly seeing whether evidence may be exculpatory and cause them to minimize evidence of potential misconduct. [Infra at 28-32]. Where prosecutors have systemically failed to fulfill their obligations, this Court must exercise its superintendence powers to ensure that people presumed innocent have access to all evidence to which they are entitled. [Infra at 39-43].

A DOJ investigation revealed a pattern or practice of misconduct, including excessive force and falsification of reports, within the Narcotics Bureau of the SPD. [Supra at 15-16]. However, rather than representing the results of a completed investigation, the DOJ report was only a starting point, and was, by its own terms, limited. [Infra at 32-36]. The DOJ investigation triggered the HCDAO's obligation to investigate and disclose exculpatory evidence. [Infra at 36-39]. This burden is on the Commonwealth and cannot be delegated to defense counsel. [Infra at 21-22]. To prevent and correct wrongful convictions, this Court must affirm the prosecutor's duty to investigate and disclose misconduct and provide clear guidance in circumstances where prosecutors assert an inability to comply with their obligations. [Infra at 39-43].

ARGUMENT

I. TO SAFEGUARD THE PRESUMPTION OF INNOCENCE AND PREVENT WRONGFUL CONVICTIONS, THIS COURT MUST CLARIFY THAT THE DUTY IMPOSED ON PROSECUTORS UNDER MASSACHUSETTS AND FEDERAL LAW INCLUDES A DUTY TO INVESTIGATE BOTH KNOWN AND *POTENTIAL* MISCONDUCT

A. Prosecutors Must Be Held To The Highest Ethical Standards Of Disclosure Because Access To Information About Official Misconduct Is Necessary To Prevent Wrongful Convictions

Prosecutors are “powerful actors” in the criminal legal system⁸ who have a duty to “seek justice within the bounds of the law, not merely to convict.”⁹ This duty requires that prosecutors serve “the public interest and should act with integrity and balanced judgment.”¹⁰ Prosecutors wield a broad range of discretionary powers, such as determining: (i) which charges to pursue; (ii) whether to seek cash bail or preventative detention; (iii) which witnesses to call;

⁸ The Facts on Progressive Prosecutors: How and Why Prosecutors Should Help End Mass Incarceration, Center for American Progress, (March 19, 2020), <https://www.americanprogress.org/article/progressive-prosecutors-reforming-criminal-justice/#:~:text=What%20is%20the%20role%20of,and%20supervisors%20of%20public%20safety> (hereinafter cited as “The Facts on Progressive Prosecutors”).

⁹ American Bar Association’s Criminal Justice Standards for the Prosecution Function, Standard 3-1.2(b) (hereinafter cited as “American Bar Association”).

¹⁰ Id.

and (iv) what sentences to recommend.¹¹ They have the ability to disclose exculpatory information or (wrongfully) to “hide evidence that might hurt their case.”¹² Actions taken, or not taken, by prosecutors can mean the difference between freedom and incarceration for people in the criminal legal system, all of whom start with the presumption of innocence.

An estimated 95 percent of criminal cases end in a plea, and prosecutors have significant control over the resolution of a criminal case through a plea.¹³ With this power comes responsibilities, including to “protect the innocent” and “respect the constitutional and legal rights of all persons, including suspects and defendants.”¹⁴

To protect fundamental due process rights, prosecutors must disclose to the accused exculpatory evidence in the government’s possession. See Brady v. Maryland, 373 U.S. 83, 87 (1963); Kyles v. Whitley, 514 U.S. 419, 437-38 (1995) (“duty to learn of any favorable evidence known to the others acting on the government’s behalf” includes “evidence known only to police investigators and

¹¹ The Facts on Progressive Prosecutors.

¹² Brady’s Failure, Inquest, (January 17, 2023), <https://inquest.org/bradys-failure/> (hereinafter cited as “Brady’s Failure”).

¹³ The Facts on Progressive Prosecutors.

¹⁴ American Bar Association, at 3-1.2(b).

not to the prosecutor”); Giglio v. United States, 405 U.S. 150, 155 (1972)

(prosecutors must disclose information suggesting a witness may not be credible).

Prosecutors must also disclose information casting doubt on the credibility of the police:

[W]here a prosecutor determines from information in his or her possession that a police officer lied to conceal the unlawful use of excessive force, whether by him- or herself or another officer, or lied about a defendant's conduct and thereby allowed a false or inflated criminal charge to be prosecuted, the prosecutor's obligation to disclose exculpatory information requires that the information be disclosed to defense counsel in any criminal case where the officer is a potential witness or prepared a report in the criminal investigation.

In re Grand Jury Investigation, 485 Mass. 641, 658 (2020); accord Giglio, 405 U.S. at 155; United States ex rel. Smith v. Fairman, 769 F.2d 386, 391 (7th Cir. 1985) (vacating conviction and ordering new trial where exculpatory evidence that cast doubt on the credibility of the police officers should have been disclosed).

This Court has provided even greater protection to individuals seeking access to exculpatory material in their cases under Massachusetts law. See Commonwealth v. Tucceri, 412 Mass. 401, 406 (1992) (“[P]rosecutors, who are agents of the State and often have access to information that defendants may not have, should be encouraged to disclose exculpatory evidence that in fairness defendants should have for their defense”); Commonwealth v. Gallarelli, 399 Mass. 17, 21 n.5 (1987) (adopting a test for assessing exculpatory evidence that is

a “more prudent safeguard[] of defendants’ rights” than the test adopted by the Supreme Court); Commonwealth v. Henderson, 411 Mass. 309, 311 (1991) (due process protections where the police failed to preserve potentially useful evidence are greater in Massachusetts than those adopted by the Supreme Court).

Favorable information must be disclosed *even if* the defendant might be able to access the information through another channel, and *even if* the defendant did nothing to attempt to obtain the information. See Tucceri, 412 Mass. at 410 (granting new trial motion where defense counsel knew of the existence of exculpatory information but failed to ask for it at the time of trial, because “the omissions of defense counsel . . . do not relieve the prosecution of its obligation to disclose exculpatory evidence”). In other words, the obligation is on the prosecutor.

Any uncertainty regarding disclosure obligations must be resolved in favor of disclosure:

[O]nce the information is determined to be exculpatory, it should be disclosed — period. And where a prosecutor is uncertain whether information is exculpatory, the prosecutor should err on the side of caution and disclose it.

In re Grand Jury Investigation, 485 Mass. at 650. Massachusetts Supreme Judicial Court Rule 3:07 Rule of Professional Conduct 3.8(d) and (g), reinforces these requirements and dictates that prosecutors must not “avoid pursuit of

evidence because the prosecutor believes it will damage the prosecution’s case or aid the accused.” Mass. R. of Prof. C. 3.8(g).

Although these disclosure rules are designed to protect a defendant’s right to a fair trial, a prosecutor’s broad discretion in determining what, if anything, must be disclosed to a defendant can be a significant barrier to disclosure that can unfairly prejudice the defendant. See Commonwealth v. Pope, 489 Mass. 790, 791, 794-95 (2022) (holding that the Commonwealth violated the defendant’s rights by withholding police reports that contained key information regarding the credibility of witnesses).

When a prosecutor fails to comply with these rules, the consequences are dire, violating an individual rights and causing factually innocent people to be wrongfully convicted and incarcerated, losing years of their lives.¹⁵ See Comm. for Pub. Couns. Servs. v. Att’y Gen., 480 Mass. 700, 734 (2018) (“[W]e do not ‘expect defendants to bear the burden of a systemic lapse’” (citation

¹⁵ Official misconduct is the leading cause of wrongful convictions, with Brady violations constituting the most common type of official misconduct, contributing to 63% of wrongful convictions for murder. See Race and Wrongful Convictions in the United States: 2022, National Registry of Exonerations, at 6 (September 23, 2022), <https://www.law.umich.edu/special/exoneration/Documents/Race%20Report%20Preview.pdf> (hereinafter cited as “Race and Wrongful Convictions”).

omitted)). As explained in Section I(B), these harms fall disproportionately on Black people and people of color.¹⁶

B. Police And Prosecutorial Misconduct — Including The Failure To Investigate And Disclose Exculpatory Evidence — Substantially Contributes To Wrongful Convictions, Disproportionately Impacting Black People And People Of Color

Official misconduct is the leading cause of wrongful convictions.¹⁷ In September 2020, a comprehensive analysis conducted by the National Registry of Exonerations (“NRE”), an independent research entity, revealed that official misconduct by police and prosecutors “contributed to the conviction of innocent defendants in 54% of known exonerations” across the nation.¹⁸ Concealment of exculpatory evidence is one of the most prevalent types of official misconduct, contributing to about 44% of all known wrongful convictions.¹⁹ Of the known

¹⁶ Black Americans are incarcerated at nearly five times the rate as their white counterparts. See Racial and Ethnic Disparities in the Criminal Justice System, National Conference of State Legislatures, (May 24, 2022), <https://www.ncsl.org/civil-and-criminal-justice/racial-and-ethnic-disparities-in-the-criminal-justice-system#:~:text=An%20October%202021%20report%20from,non%2DLatinx%20whites.%E2%80%9D%20At>.

¹⁷ Brady’s Failure.

¹⁸ Government Misconduct and Convicting the Innocent: The Role of Prosecutors, Police and Other Law Enforcement, National Registry of Exonerations, at 11, (September 1, 2020), https://www.law.umich.edu/special/exoneration/Documents/Government_Misconduct_and_Convicting_the_Innocent.pdf (emphasis added) (hereinafter cited as “Government Misconduct”).

¹⁹ Id. at 30, 32.

wrongful convictions where official misconduct played a role, 73% involved prosecutors who were responsible for failing to disclose exculpatory evidence, including numerous cases where prosecutors became aware of favorable evidence in the possession of police agencies.²⁰

In Massachusetts, official misconduct contributed to at least 60% of exonerations since 1989.²¹ In Hampden County alone, police and prosecutorial misconduct is known to have contributed to the wrongful convictions of at least nine factually innocent people since 1987, collectively robbing them of 109 years of freedom.²²

Mark Schand, who served nearly 30 years in prison for crimes he did not commit, serves as a poignant example. In 1987, Mr. Schand was convicted of first-degree murder, armed robbery, and assault in connection with a 1986 shooting in a Springfield bar based in part on false eyewitness testimony. In 2013, the Superior Court vacated Mr. Schand's convictions based on evidence that the SPD used suggestive lineup identification procedures to obtain a false identification of

²⁰ Id. at 82.

²¹ See Exoneration Detail List, National Registry of Exonerations, (accessed August 22, 2023), <https://www.law.umich.edu/special/exoneration/Pages/browse.aspx> (hereinafter cited as "Exoneration Detail List").

²² Id.

Mr. Schand and because Hampden County prosecutors failed to disclose exculpatory evidence that the integrity of the police lineups was corrupted. After his exoneration, Mr. Schand filed a federal civil rights lawsuit against the city of Springfield and Hampden County, and a jury awarded him \$27 million.²³

In another example involving police misconduct, Charles Wilhite was wrongfully convicted for the murder of Alberto Rodriguez, who was shot and killed in Springfield, Massachusetts in 2010.²⁴ Two eyewitnesses who identified Mr. Wilhite as the shooter later recanted their statements, stating that they felt pressured and intimidated by the SPD into identifying Mr. Wilhite as the shooter.²⁵ As a result of this coerced “eyewitness” testimony, Mr. Wilhite was wrongfully sentenced to life in prison without the possibility of parole, before being

²³ Mark Schand, National Registry of Exonerations, (December 9, 2020), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4288>. See also Jury Awards \$27 Million To Massachusetts Man Wrongfully Convicted Of Murder, NPR, (Oct. 2, 2019), <https://www.npr.org/2019/10/02/765786518/jury-awards-27-million-to-massachusetts-man-wrongfully-convicted-of-murder>.

²⁴ Charles Wilhite, National Registry of Exonerations, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4100> (hereinafter cited as “Charles Wilhite”).

²⁵ Wilhite v. Pioggia, No. 14-30023, at *5-6 (D. Mass filed Jan. 29, 2014), <http://static1.1.sqspcdn.com/static/f/634737/24293838/1391114235713/1+-+Wilhite+Complaint.pdf?token=UXtajQQZJpe0hJiUQjLGkzfpifk%3D>.

exonerated in 2013. Mr. Wilhite filed a federal civil rights lawsuit against the city of Springfield and the police, which was settled for \$1.4 million.²⁶

Black people are disproportionately victimized by wrongful convictions, including wrongful convictions caused by official misconduct. As of August 16, 2023, the NRE listed 3,357 defendants who were wrongfully convicted in the United States since 1989.²⁷ Fifty-three percent of these exonerees were Black, even though Black people represent only 13.6% of the US population.²⁸

Concealing exculpatory evidence was a factor in 63% of cases where official misconduct led to a wrongful conviction.²⁹ Indeed, Black people are 50% more likely to be wrongfully convicted for murder due to official misconduct than white defendants.³⁰ For drug crimes — the types of crimes investigated by the SPD Narcotics Bureau (the unit found to engage in a pattern or practice of misconduct) — the NRE found that 69% of those wrongfully convicted were Black and 16% were white.³¹ In cases where wrongful convictions resulted from fabricated drug

²⁶ Charles Wilhite.

²⁷ Exoneration Detail List.

²⁸ Race and Wrongful Convictions, at p. 1.

²⁹ Id. at 6.

³⁰ Id. at iii.

³¹ Id. at 1.

crimes by police, almost all defendants were Black people or people of color.³²

The data is no different in Massachusetts. For example, Black people make up just 9.5% of the Massachusetts population, but, since 1989, have comprised at least 40% of exonerees in Massachusetts.³³ By contrast, white people make up 79.4% of the Commonwealth's population but comprise less than half of those found to have been wrongly convicted in Massachusetts.³⁴

These statistics only scratch the surface in capturing the harms caused by nondisclosure of exculpatory evidence that fall disproportionately on Black people. To honor its articulated commitment to racial justice in the Commonwealth,³⁵ the Justices of this Court must intervene to protect the rights of people whose freedom

³² Id. at 27.

³³ See Exoneration Detail List, and U.S. Census Bureau, (accessed August 16, 2023), <https://www.census.gov/quickfacts/fact/table/MA/PST045222>.

³⁴ Id.

³⁵ In June 2020, the Justices of this Court pledged the Court's commitment to racial justice in the Commonwealth: "As judges, we must look afresh at what we are doing, or failing to do, to root out any conscious and unconscious bias in our courtrooms; to ensure that the justice provided to African-Americans is the same that is provided to white Americans; to create in our courtrooms, our corner of the world, a place where all are truly equal. . . . This must be a time not just of reflection but of action." See Letter from the Seven Justices of the Supreme Judicial Court to Members of the Judiciary and the Bar, Massachusetts Supreme Judicial Court, (June 3, 2020), <https://www.mass.gov/news/letter-from-the-seven-justices-of-the-supreme-judicial-court-to-members-of-the-judiciary-and>.

from wrongful conviction depends on full investigation and disclosure of the misconduct by the SPD.

C. The Close Relationship Between Prosecutors And Police Officers Can Lead To Cognitive Bias That Affects The Disclosure Of Exculpatory Evidence, Especially Evidence Of Police And Prosecutorial Misconduct

Prosecutors are obligated to investigate and disclose exculpatory evidence, including evidence of police misconduct. See Commonwealth v. Ware, 471 Mass. 85, 95 (2015) (the Commonwealth has a “duty to conduct a thorough investigation to determine the nature and extent of [the] misconduct, and its effect both on pending cases and on cases in which defendants already had been convicted.”); see United States v. Brooks, 966 F.2d 1500, 1504 (D.C. Cir. 1992) (after revelation of information bearing on the credibility of the prosecution’s key police witness, ordering the U.S. Attorney’s office to review the files of the police department for information that “may contain material exculpatory information.”).

In facing either question — to investigate potentially exculpatory information or disclose known information — the decision ultimately depends on judgment calls by individual prosecutors about whether information may be favorable to the accused. These judgment calls are often tainted by cognitive biases that can prevent a prosecutor from being able to objectively assess the evidence of guilt or innocence, the integrity of the underlying investigation, or the likelihood of a wrongful conviction.

Cognitive biases are “unconscious beliefs” and “inadvertent mental tendencies” that can influence decision making in any context, including criminal investigations.³⁶ These biases include confirmation bias, hindsight bias, and unconscious or implicit racial bias, among other types of cognitive bias.³⁷ Cognitive biases “can emerge from the specific case at hand and how it was examined, from the specific person conducting the examination and organizational factors, as well as from human nature.”³⁸

Confirmation bias occurs “when a person selectively seeks, recalls, weights, or interprets information in ways that support their existing beliefs, expectations, or hypotheses.”³⁹ Indeed, “when initial impressions become firm conclusions based on selective information and without a critical evaluation of all the evidence,

³⁶ See What Is Cognitive Bias and How Does It Contribute to Wrongful Conviction, Innocence Project, (August 19, 2021), <https://innocenceproject.org/news/what-is-cognitive-bias-how-it-contributes-to-wrongful-conviction/#:~:text=When%20a%20crime%20is%20committed,can%20lead%20to%20wrongful%20convictions> (cited hereinafter as “Cognitive Bias”).

³⁷ Cognitive Biases in Criminal Case Evaluation: A Review of the Research, *Journal of Police and Criminal Psychology*, at 101, (December 8, 2020), <https://link.springer.com/article/10.1007/s11896-020-09425-8>.

³⁸ Cognitive bias in forensic pathology decisions, *Journal of Forensic Sciences*, (February 20, 2021), <https://onlinelibrary.wiley.com/doi/10.1111/1556-4029.14697>.

³⁹ Cognitive Bias.

innocent people get wrongly convicted.”⁴⁰ Cognitive bias can affect how police officers or prosecutors evaluate evidence that is inconsistent with their pre-determined conclusions about a suspect’s guilt or innocence.⁴¹

In an adversarial system, where prosecutors may be faced with the incentive to withhold exculpatory evidence to win cases, cognitive bias can impact whether a prosecutor views certain information as “exculpatory.”⁴² See Tucceri, 412 Mass. at 407-08 (Commonwealth’s “disclosure requirements are inconsistent with the traditional adversary role of litigants. But the duties of a prosecutor to administer justice fairly, and particularly concerning requested or obviously exculpatory evidence, go beyond winning convictions.”). Cognitive bias is likely to play a role in circumstances where prosecutors are required to disclose evidence impeaching the credibility of police or revealing police misconduct or *potential* police misconduct. Because prosecutors work with many of the same police officers and

⁴⁰ Id.

⁴¹ Cognitive Biases in Criminal Case Evaluation: A Review of the Research, Journal of Police and Criminal Psychology, (June 23, 2021), <https://link.springer.com/article/10.1007/s11896-020-09425-8>.

⁴² Convictions are “the key to prosecutorial advancement. As Daniel Medwed put it, ‘A series of factors cause trial prosecutors to view their jobs primarily through the lens of gaining “wins” (convictions) and avoiding “losses” (acquittals).’” See The Lone Miscreant, the Self-Training Prosecutor, and Other Fictions: A Comment on Connick v. Thompson, Fordham Law Review, at 730, (November 2011), <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4669&context=flr>.

departments in the course of their duties, and must rely on them to pursue their cases, it can be that much more difficult to conclude that those officers or departments are engaging in misconduct or even admit the *possibility* of misconduct that would trigger disclosure obligations.⁴³ In fact, cognitive bias can be seen in the HCDAO’s response to the DOJ’s findings of misconduct within the SPD. See HCDAO’s Brief, at 21 (“[T]here is good reason to suspect that the [DOJ] report contains not gold, but fool’s gold . . . the DOJ’s inferences and conclusions are at best, debatable, and at worst, wrong.”).

The likelihood of cognitive bias suggests disclosure of exculpatory information should not turn on whether the prosecutor subjectively believes the evidence of misconduct is credible or whether there are arguments against the credibility or reliability of that information. The reliability of any evidence of misconduct, *should the defendant seek to introduce it*, must be determined by a judge, and the credibility of that evidence should then be determined by a judge or jury at trial. Prosecutors cannot be both the holder of the information as well as the judge of its weight. See *Blumberg v. Garcia*, 687 F. Supp. 2d 1074, 1138 (C.D.

⁴³ See *Who Shouldn’t Prosecute the Police*, Iowa Law Review, at 1472, (May 15, 2016), <https://ilr.law.uiowa.edu/sites/ilr.law.uiowa.edu/files/2023-02/ILR-101-4-Levine.pdf> (“[A]ssistant district attorneys rely on the police for successful convictions, and therefore, must have a good working relationship with the police for professional advancement.”).

Cal. 2010) (“It is . . . improper for a prosecutor to vouch for, i.e., relate his or her personal opinion regarding the weight of the evidence or the credibility of a witness.”). Cognitive bias is a significant reason why this Court’s superintendence powers are crucial at this juncture. This Court’s intervention is necessary to ensure that individuals accused or convicted of crimes will receive the information and rights to which they are entitled.

II. THE DOJ’S FINDINGS OF SYSTEMIC MISCONDUCT WITHIN THE SPD TRIGGERED THE HCDAO’S OBLIGATIONS TO INVESTIGATE AND DISCLOSE SPD MISCONDUCT, WHICH HAVE NOT BEEN MET⁴⁴

A. DOJ Pattern Or Practice Investigations Are Uncommon, Infrequent, And Reveal That Further Investigation Is Necessary To Determine The Scope Of The Commonwealth’s Investigation And Disclosure Obligations

The findings in the DOJ report triggered the Commonwealth’s duties to thoroughly investigate misconduct within the SPD to fulfill its disclosure obligations. However, the inherent limitations on DOJ pattern or practice investigations, and the evidence of resistance among police departments across the country in complying with these investigations, demonstrate that prosecutors cannot rely on DOJ reports as proxies for what they must investigate and disclose under their separate obligations.

⁴⁴ While the DOJ pattern or practice investigation provided a basis for the HCDAO to investigate and disclose exculpatory evidence, HCDAO’s obligations would be triggered by far less than a full-scale DOJ investigation.

Between 1994 and 2017, the DOJ undertook 69 pattern or practice investigations of state or local law enforcement agencies.⁴⁵ This year, the DOJ has nine ongoing pattern or practice investigations.⁴⁶ While the number of these investigations have increased over time, they are limited in reach and too infrequent to be the *only* check on police or prosecutorial misconduct.⁴⁷ Not only are these investigations rare, but they focus on police departments with pervasive issues of misconduct,⁴⁸ suggesting a reason to look further and more expansively to understand the full scope of that misconduct. Where there has been a DOJ finding that there is a pattern or practice of misconduct in a police department, as there has been in Springfield, that must be a *starting point* of where and what to investigate, rather than an *endpoint*.

⁴⁵ Emerging Patterns in Federal Responses to Police Misconduct: A Review of “Pattern or Practice” Agreements over Time, Criminology, Criminal Justice, Law & Society at University of Delaware, at 25-26, (June 25, 2019), <https://ccjls.scholasticahq.com/article/11131-emerging-patterns-in-federal-responses-to-police-misconduct-a-review-of-pattern-or-practice-agreements-over-time/attachment/27393.pdf>.

⁴⁶ Justice Dept. Opens Civil Rights Investigation of Memphis Police, New York Times, (July 27, 2023), <https://www.nytimes.com/2023/07/27/us/memphis-police-civil-rights-investigation.html>.

⁴⁷ See What Is A Pattern-Or-Practice Investigation?, Legal Defense Fund, (March 8, 2023), <https://www.naacpldf.org/police-pattern-practice-investigation/>.

⁴⁸ The Facts on Pattern-or-Practice Investigations, Center for American Progress, (July 8, 2021), <https://www.americanprogress.org/article/facts-pattern-practice-investigations/>.

DOJ findings in this context often expose a culture of misconduct that involves multiple members and ranks of a police department or prosecuting entity, a failure to internally address the misconduct, and its ongoing nature. The findings from the DOJ's pattern or practice investigation into the SPD are similar in their systemic scope. In addition to finding excessive force, the DOJ's report found pervasive falsification of police reports by the SPD, including failures to complete prisoner injury reports in 89% of cases in 2017.⁴⁹ There was substantial evidence showing widespread misconduct by SPD officers, including:

(i) failing to report use-of-force incidents that should have been reported even under the SPD's own lax reporting policies, (ii) using vague language when reporting force that prevented identification of unlawful use of force in a significant number of cases, and (iii) submitting reports with inaccurate or falsified information concerning police conduct.⁵⁰

The report also found that these abuses remained unchecked because the SPD had flawed and insufficient protocols in place to address systemic police misconduct.⁵¹ As such, the DOJ could not determine the vast extent of the problem and concluded that “*more is required*” to address the constitutional violations and

⁴⁹ DOJ Report, at 16.

⁵⁰ Id.

⁵¹ See id. at 22-27.

systemic deficiencies” within the SPD.⁵² The DOJ investigation was able to identify that there was a problem but had to acknowledge that the work of exposing the misconduct was far from complete. The explicit limitations of the DOJ investigation were a clear signal that the HCDAO must go further.

B. The HCDAO Cannot Rely Solely On The DOJ To Identify And Disclose Evidence Of Misconduct Within The SPD

Resistance to DOJ pattern or practice investigations, including where there is a Consent Decree, is not uncommon. For example, in Cincinnati, the police refused to cooperate with a monitoring team put in place by a consent decree to oversee implementations of the reforms in the consent decree.⁵³ The officers denied “access to certain data as required by the agreement with the Department of Justice and even order[ed] one member of the monitoring team out of police headquarters.”⁵⁴ Resistance by Los Angeles Police Officers (“LAPD”) was also “public and brazen.”⁵⁵ Their monitor found that some LAPD officers “intentionally undermine[d] the Consent Decree and the LAPD’s efforts at reform”

⁵² Id. at 6, 19 (emphasis added).

⁵³ The Justice Department’s Pattern-or-Practice Reform Program, 1994-2017: Goals, Achievements, and Issues, University of Nebraska Annual Review of Criminology, at 32, (August 23, 2021), <https://www.annualreviews.org/doi/pdf/10.1146/annurev-criminol-030920-102432>.

⁵⁴ Id.

⁵⁵ Id.

and “publicly denigrated the decree and urged the community to be outraged at the cost to taxpayers.”⁵⁶

This type of systemic resistance was evident in the wake of the Springfield DOJ Report as well. Indeed, in response, a former SPD officer created a report as a “rebuttal” to the misconduct found by the DOJ. See Graham Brief at 11. The HCDAO has also demonstrated that it does not accept the findings of the DOJ Report. See HCDAO Brief, at 21. Here, where the HCDAO has not only failed to commit to thoroughly investigating the findings of the DOJ report, but has explicitly doubted their veracity, see HCDAO Brief, at 24, this Court must compel the HCDAO to comply with its duties. As discussed below, there are several steps a prosecutor can and must take when investigating claims arising from a finding of a pattern or practice of misconduct.

C. The DOJ’s Pattern Or Practice Finding Triggered The HCDAO’s Duty To Investigate And Disclose Misconduct Among The SPD

Prosecutors notified of police misconduct must discover and disclose that misconduct as exculpatory evidence. In re Grand Jury Investigation, 485 Mass. at 650. Where, as here, the DOJ found a pattern or practice of misconduct by the SPD, the HCDAO must go even further, seeking to determine the scope of such misconduct, with particular guardrails around the investigation to prevent cognitive

⁵⁶ Id.

bias from artificially limiting that scope. See Commonwealth v. Cotto, 471 Mass. 97, 114 (2015) (citation omitted) (exercising its “superintendence power to fashion a workable approach” to provide defendants whose evidence samples were impacted by misconduct at the Amherst Drug Lab with an opportunity to discover whether their cases were affected by that misconduct). This inquiry must involve both the production of underlying documents as well as interviewing witnesses, especially community members who are potential victims of police misconduct. This Court need not provide an exact roadmap of how such an investigation must occur except to underscore that it should be independent, open in scope and transparency, and include relevant disclosures. A relevant disclosure might be, for example, a list of cases impacted by the potential misconduct, both pending and post-conviction. Should the prosecuting agency be unable to pursue a widespread investigation due to a potential conflict of interest or cognitive biases involved, prosecutors (or this Court) should identify an independent entity to do so.⁵⁷

⁵⁷ In 2022, the Washington legislature created the “Office of Independent Investigations” to remove police from investigating themselves in incidents of police misconduct. This is a step toward transparency and accountability that “no other U.S. state or agency has ever tried.” See New WA agency seeks to end practice of police investigating themselves, The Seattle Times, (November 19, 2022), <https://www.seattletimes.com/seattle-news/law-justice/when-wa-officers-use-force-other-cops-investigate-a-new-agency-aims-to-change-that/>. Further, there is a pending federal bill called the Police Training and Independent Review Act, which encourages independent and impartial

(cont’d)

Any costs to the HCDAO to investigate and disclose official misconduct will be trivial compared to the harms and costs of correcting wrongful convictions. The fiscal and emotional costs of addressing and remedying wrongful convictions are incredibly high. As of May 18, 2023, U.S. taxpayers have paid \$2,751,017,023 in payments to exonerees who were wrongfully convicted.⁵⁸ In Massachusetts, federal awards to exonerees totaled \$171,554,000.⁵⁹ Exonerees also collected \$19,320,000 in payments under Massachusetts’ wrongful conviction statute, enacted in 2004.⁶⁰ Since 1989, “taxpayers have wasted \$944 million to incarcerate [B]lack men and women that were later found to be innocent. That number climbs to \$1.2 billion when including Hispanic men and women.”⁶¹ These costs cannot

investigations into law enforcement’s use of deadly force. See S.738 — 117th Congress (2021-2022).

⁵⁸ Compensation by the Numbers: Federal Civil Rights Lawsuit Compensation – 18 May 2023, National Registry of Exonerations, (May 18, 2023), <https://www.law.umich.edu/special/exoneration/Documents/Table%202%20v.2%20-%20Civil%20Compensation%205.23.pdf> (hereinafter cited as “Federal Compensation by the Numbers”).

⁵⁹ Id.

⁶⁰ Compensation by the Numbers: State Statutory Compensation – 6 April 2023, National Registry of Exonerations, (April 6, 2023), <https://www.law.umich.edu/special/exoneration/Documents/Table%201%20-%20State%20Compensation%20v.2.pdf>.

⁶¹ US taxpayers spent almost \$1 billion incarcerating innocent black people, Yahoo News, (November 20, 2019), <https://www.yahoo.com/video/us-taxpayers-spent-over-4-billion-incarcerating-innocent-people-184439282.html?guccounter=1>.

begin to match the cost of the 28,573 total years lost for innocent people who were wrongfully convicted and officially exonerated, which includes 1,108 years lost in Massachusetts alone.⁶²

D. Where A Police Department Is Unwilling To Share Evidence Of Misconduct With The Prosecuting Agency, The Commonwealth Is Not Absolved Of Its Disclosure Obligations And Must Nonetheless Pursue Every Avenue To Obtain The Information Or, Failing That, To Disclose Its Noncompliance

It is not enough for the prosecutor to merely request documents from the police and then passively accept any response they receive. If officers refuse to cooperate, prosecutors must pursue all options available to them under the law to fulfill their duty of obtaining and disclosing evidence of police misconduct. United States ex rel. Smith v. Fairman, 769 F.2d 386, 391-92 (7th Cir. 1985) (“[T]he purposes of Brady would not be served by allowing material exculpatory evidence to be withheld simply because the police, rather than the prosecutors, are responsible for the nondisclosure.”).

Specifically, prosecutors should seek a court order for the police to produce the documents, and should that fail, pursue a show cause hearing for why the police department should not be sanctioned for refusing to comply with the court order. For example, in Philadelphia, the District Attorney has asked for the

⁶² Federal Compensation by the Numbers.

Philadelphia Police Department to be held in contempt for refusing to cooperate with the office's request for officer disciplinary material.⁶³

If, due to lack of cooperation by the police (or another entity involved in the prosecution of a case), a prosecutor is unable to investigate the extent to which exculpatory material exists, then the prosecutor cannot certify that they are complying with their obligations to provide exculpatory evidence. The prosecuting agency must then identify and give formal notice in writing to the affected defendants (such as through a “Notice of Noncompliance” or “Notice of Ongoing Violation of Discovery Obligations”). This disclosure should indicate, at minimum, (1) the efforts the prosecutor made to investigate the extent of exculpatory evidence, (2) the communications by both the prosecutor and the entity (including witness names) regarding obstruction of the investigation and/or failure to produce exculpatory evidence known to the prosecutor, and (3) any corrective actions taken by the prosecution to remedy the ongoing discovery violations. This formal notice requirement goes beyond the bare notice included in proposed changes to Rule 14 (“[T]o notify the defense of the existence of any information subject to disclosure that cannot be promptly copied or made

⁶³ Tool for police reform rarely used by local prosecutors, The Associated Press, (October 21, 2021), <https://apnews.com/article/death-of-george-floyd-religion-police-george-floyd-seattle-b20b50bd1562c70e59fe30689a8a867f> (hereinafter cited as “Tool for Reform”).

available, as well as any such material that has been destroyed or that a member of the prosecution team will not provide the prosecutor.”). See Report of the Special Master, (Oct. 18, 2022), at 64-66. In addition, obstruction of an investigation or failure to provide exculpatory evidence in *one case* would itself create disclosure obligations in *other cases* involving the same actors who failed to comply.

Such formal notice will enable trial courts to provide relief to affected defendants, including the dismissal of their cases. See Commonwealth v. Scott, 467 Mass. 336, 352 (2014) (exercising “superintendence power to fashion a workable approach to motions to withdraw a guilty plea brought by defendants affected by” misconduct at the Hinton drug lab); Comm. for Pub. Couns. Servs. v. Att’y Gen., 480 Mass. 700, 704-05 (2018) (exercising “superintendence authority [to] vacate and dismiss all criminal convictions tainted by governmental wrongdoing” that was “compounded by prosecutorial misconduct.”). A notice of noncompliance would ensure that the burden does not unduly shift to the defendants to seek relief when it is the Commonwealth that is unable to fulfill its obligations. This is especially critical where the defendant cannot, and should not have to, prove the importance of information to which they have no access. Such notice of noncompliance should occur before any resolution in the case so that an accused person does not prematurely resolve their case through a plea before they can adequately assess the evidence against them and the evidence in their favor.

Prosecutors could also choose to file *nolle prosequis* of cases in which there is an ongoing noncompliance of their obligations to disclose exculpatory evidence due to noncooperation by an agent of the prosecution. For example, in Chicago, prosecutors moved to dismiss at least 226 convictions tied to Officer Ronald Watts, one of the officers on Attorney Foxx’s “do not call” list.⁶⁴ Watts and his officers “preyed on innocent people at the Ida B. Wells Homes public housing project, where they extorted money and planted drugs and guns, knowing their victims — largely [B]lack and low-income residents — wouldn’t be believed.”⁶⁵

When prosecutors *do* pursue investigations after a report of potential misconduct and/or act to disclose misconduct, they have been instrumental to correcting those injustices. For example, in 2018, the Philadelphia District Attorney’s Office discovered and released a list of officers that had been internally circulated in the DA’s office, containing names of officers who have histories of

⁶⁴ Cook County State’s Attorney Kim Foxx releases ‘Do Not Call’ list of unreliable police officers, Washington Examiner, (July 18, 2023), <https://www.washingtonexaminer.com/policy/courts/cook-county-state-attorney-list-unreliable-police-officers>.

⁶⁵ Police Have Dropped 226 Cases Of Corrupt Ex-Chicago Sgt. Watts, National Criminal Justice Association, (February 6, 2023), <https://www.ncja.org/crimeandjusticenews/police-have-dropped-226-cases-of-corrupt-ex-chicago-sgt-watts>.

lying, bias, and excessive force.⁶⁶ This list led to the overturning of at least 2,000 wrongful convictions.⁶⁷

Leaving the disclosure of exculpatory evidence — especially evidence related to police misconduct — to be exclusively determined by the police department’s own discretion would incentivize police departments to keep that information hidden. The judicial system cannot countenance any practice or procedure that incentivizes withholding of exculpatory information from people who are at risk of losing their freedom (among other significant consequences). Because there has been a finding of a pattern or practice of misconduct within the SPD, the HCDAO must thoroughly investigate and disclose this misconduct, or otherwise report its noncompliance, resulting in the potential dismissal of affected cases.

CONCLUSION

For the foregoing reasons, the New England Innocence Project, the Innocence Project, Inc., and the Boston College Innocence Program respectfully urge this Court to grant the relief requested by Petitioners to ensure that the Commonwealth fulfills its obligations to investigate and disclose exculpatory evidence.

⁶⁶ Tool for Reform.

⁶⁷ Id.

Dated: August 23, 2023
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CERTIFICATE OF COMPLIANCE PURSUANT TO MASS R.A.P. 17(c)(9)

I, Adya Kumar, hereby certify that this brief complies with the rules of court that pertain to the filing of amicus briefs, including, but not limited to: Rule 17 (brief of an amicus curiae) and Rule 20 (form and length of briefs).

I further certify that this brief complies with the applicable length limit of Mass. R. App. P. 20(a)(2)(C) for an amicus curiae brief produced in a proportionally spaced font because it was prepared in 14-point Times New Roman font using Microsoft Word (2016) and, excluding the parts of the brief exempted by Mass. R. App. P. 20(a)(2)(D), it contains 6,291 words.

Dated: August 23, 2023

/s/ Adya Kumar
Adya Kumar

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

No. SJC-13386

CHRIS GRAHAM, JORGE LOPEZ, MEREDITH RYAN, KELLY AUER,
COMMITTEE FOR PUBLIC COUNSEL SERVICE, and HAMPDEN COUNTY
LAWYERS FOR JUSTICE,
Petitioners-Appellants,

v.

DISTRICT ATTORNEY OF HAMPDEN COUNTY,
Respondent-Appellee.

CERTIFICATE OF SERVICE

I, Adya Kumar, hereby certify that on August 23, 2023 a true copy of the Brief of Amicus Curiae The New England Innocence Project, Innocence Project, Inc., and Boston College Innocence Program, was served by the E-Filing System and/or by email upon counsel of record as follows:

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